PB9 was received by us after we had received the guarantee. The application for letter of credit was accepted. This letter of credit in favour of PT Nassalabi Co of Indonesia draft to be drawn on Gobee Co Ltd for US$672,500. We approved the draft. This letter of credit was made pursuant to the agreement leading to the guarantee.

PB10 — Gobee Co Ltd requested that letter of credit be issued subject to the terms and conditions in PB10. We then applied to the Ka Wah Bank Ltd for an L/C to be drawn on us in favour of PT Nassalabi. Payment was made to Nassalabi by Ka Wah Bank under the L/C. L/C for the sale of 5,000 cubic metres of Indonesian round logs (Indonesian origin).

PB11 — This is our application to Ka Wah Bank for L/C for US$672,500 drawn on us. Notifying party in our L/C was Cheng Hsin Trading Co Ltd of 242 Lin Shen 1st Road, Kaohsiung Taiwan. There was a change in instruction. Cheng Hsin telexed us on 22 June 1979 to change notifying party to Winsome Taiwan Enterprises Corporation of 242 Lin Shen 1st Road Kaohsiung Taiwan (PB13).

On 29 June 1979 a telex was sent by Simon WH Tsai to John K Chan, a director of K-Rex Finance Ltd requesting further change of notifying party as in PB13. The L/C was transferable. Ka Wah Bank paid Nassalabi, the vendors of the logs.

In Hong Kong the Banking Ordinance came into force in 1964. Section 5 of the Ordinance enacts that except as may be provided in the Ordinance no banking business shall be transacted in Hong Kong except by a company which is in possession of a valid licence issued by the Government in Council authorizing it to transact banking business in Hong Kong.

On 21 June 1979 the Ka Wah Bank in Hong Kong on the application of the plaintiffs who in turn had been requested by one Gobee Co of Hong Kong issued an irrevocable letter of credit for US$672,500 in favour of one PT Nassalabi Co of Kalimantan, Indonesia to pay for timber ordered by one Cheng Hsin Trading Co Ltd of Taiwan. Subsequently one Winsome Taiwan Enterprises Corp of Taiwan was substituted for the said Cheng Hsin Trading Co. As the Ka Wah Bank was the issuer of the irrevocable letter of credit, the plaintiffs, not being party to the transaction, cannot sue the defendants on the guarantee because the guarantee was in consideration of someone making advances or otherwise extending credit facilities to one Gobee Co Ltd. The guarantee not covering advances or credit facilities offered by Ka Wah Bank, the defendants are not liable under the guarantee on the irrevocable letters of credit. The plaintiffs not being bankers cannot now sue on a banking transaction.

As an alternative ground for their claim the plaintiffs rely on the compromise agreement of 9 June 1980. This alternative ground in view of there being no liability under the said guarantee the claim under the compromise agreement is misconceived. The plaintiffs' claim against the second defendant totally fails and his action is dismissed with costs.

Further, Mr Peter Kwok in his evidence says, 'The name of the company has been changed from K-Rex Finance Ltd to K-Rex Enterprises Ltd. This was done on 23 September 1986.' In view of this it seems to me that the present action is not maintainable by the plaintiffs, K-Rex Finance Ltd, and should properly have been in the name of K-Rex Enterprises Ltd. The action is dismissed with costs.

Action dismissed.

Solicitors: *Drew & Napier; Boey Ng & Wan.*

Reported by *Mathavan Devadas*

Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd

HIGH COURT (SINGAPORE) — COMPANIES WINDING-UP NO 254 OF 1989
CHAO HICK TIN JC
28 SEPTEMBER 1990

Companies and Corporations — Winding-up — Whether counterclaims substantial and bona fide — Whether petition for winding-up should be stayed

Words and Phrases — 'Neglected' — Companies Act (Cap 50, 1988 Ed), s 254(2)(a)

The petitioning creditors ('PC') petitioned to wind up the company ('C') on the ground that C is deemed insolvent under s 254(1)(e) read with s 254(2)(a) of the Companies Act (Cap 50, 1988 Ed). For several years, PC and C had a business relationship in the construction industry and were involved in several projects. The petition is based on a debt arising under two judgments totalling $544,346.43. PC served a statutory notice of demand on C but C did not satisfy the sum demanded after 21 days. C admitted that it owes PC the said sum under the two judgments but says that by virtue of their bona fide counterclaims which in totality very much exceeded the debt owing from C to PC under the two judgments, C is justified in not complying with PC's statutory demand.

The issues are, first, whether C's counterclaims against PC are bona fide and based on substantial grounds and secondly, even if they are based on substantial grounds, whether that is a sufficient basis to dismiss the petition or order a stay. At the eleventh hour, PC filed an affidavit introducing evidence on C's general insolvency.

Held, staying the petition:

(1) The counterclaims in respect of projects (ii) and (iii) are bona fide and based on substantial grounds and either of the two counterclaims exceed the amount of debt owing by C to PC under the two judgments.

(2) The important word in s 254(2)(a) of the Companies Act is the word 'neglected'. Mere omission to pay a debt on demand does not of itself constitute neglect to do so within the meaning of that provision. The word 'neglect' necessarily implies some element of fault.

(3) The authorities draw no distinction between a counterclaim that arises out of the same transaction or contract as the debt owing and a counterclaim which does not. The important thing is that the counterclaim must be bona fide and based on substantial grounds. The court should exercise its discretion in the light of all the circumstances of the case.

(4) It would be wrong to treat each project in isolation. C and PC had established a special kind of relationship over many years involving several projects. Their arrangement had some unusual features. To wind up C based on two accounts between the parties instead of all the accounts might not be entirely just, as C might very well be at the end of the day a net creditor. There does not appear to be any creditor interested in this winding-up as no one filed any notice to support or oppose the petition. In all the circumstances, C has not 'neglected' to satisfy the statutory notice and it would be just to stay the proceedings.

(5) The principles applicable to a stay of execution application and to a petition to wind up are different. The presentation of a petition to wind up a company is not strictly in the nature of an execution.

(6) The affidavit filed by PC at the eleventh hour was an attempt to introduce evidence on C's general insolvency even though nothing on that is stated in the petition itself. It would be grossly unfair to permit the introduction of such facts by affidavit at that late stage. C had hardly an adequate opportunity to rebut and the affidavit was disregarded.

Cases referred to

1 *Re London & Paris Banking Corp* (1874) 19 Eq 444 (folld)
2 *Re LHF Wools* [1969] 3 All ER 882 (folld)
3 *Re Portman Provincial Cinemas Ltd* (1964) 108 Sol J 581 (refd)
4 *Re Glenbawn Park Pty Ltd* (1977) 2 ACLR 288 (refd)
5 *Re Jeff Reid Pty Ltd* (1980) 5 ACLR 28 (folld)
6 *Universal Chemicals* v *Hayter* [1980] 2 NZLR 737 (refd)
7 *Re Douglas Griggs Engineering Ltd* [1963] Ch 19 (distd)
8 *L & D Audio Acoustics Pty Ltd* v *Pioneer Electronic Australia Pty Ltd* (1983) 7 ACLR 180 (folld)
9 *Buying Systems (Aust) Pte Ltd* v *Tien Mah Litho Printing Co Pte Ltd* (1986) 10 ACLR 503 (refd)
10 *Re a Company* [1915] 1 Ch 520 (refd)
11 *Re International Tin Council* [1988] 3 WLR 1159 (refd)
12 *Re Fildes Bros Ltd* [1970] 1 All ER 923 (folld)

Legislation referred to

Companies Act (Cap 50, 1988 Ed) s 254(1)(e), (2)(a)

Richard Chia for the petitioning creditors.
Susan Kong (*Aw Ee Tuan* with her) for the company.

Cur Adv Vult

Chao Hick Tin JC: This is a petition to wind up Chng Gim Huat Pte Ltd (hereinafter called 'the company'), on the ground that the company is deemed insolvent under s 254(1)(e) read with s 254(2)(a) of the Companies Act (Cap 50, 1988 Ed). After hearing the parties, I ordered that the petition be stayed pending the determination of certain counterclaims. I now give my reasons.

The nominal capital of the company is $1m divided into 10,000 shares of $100 each. The paid-up capital of the company is $700,000. The main area of activities of the company would appear to be in the construction field.

The company and the petitioners had for several years been engaged in a kind of business relationship where the company would obtain construction works and each of the projects so secured would be entirely sub-contracted to the petitioners. Under the arrangement and as a consideration therefor, the petitioners would allow an agreed margin of the tendered price as profit to the company. As part of the arrangement, the company would also provide financial assistance to the petitioners when they required it, order and supply material to the petitioners on credit and make miscellaneous payments on behalf of the petitioners. Under such a kind of arrangement, the parties had proceeded on five projects at the following locations: (i) Telok Blangah/Temenggong Road; (ii) People's Park Katong; (iii) Chinatown Centrepoint; (iv) North Bridge Road; and (v) Hotel Grand Central.

The debt which is the subject of this petition, arose under two judgments totalling $544,346.43 — $149,972.49 in Suit No 10074/85 and $394,393.94 in Suit No 10075/85. These two sums were admitted by the company and were in relation to the North Bridge Road and the Telok Blangah projects. On 28 July 1989, the petitioners, through their solicitors, served the statutory notice of demand upon the company requiring the company to pay the aforesaid sum within 21 days from the date thereof, failing which the petitioners would commence winding-up proceedings against the company without further reference. Three weeks elapsed and the company had still not satisfied the total sum demanded.

In an affidavit filed on 13 October 1989 by one Chng Beng Siong, a director of the company, it is admitted that the company owes the petitioners a total sum of $544,346.43 under the two judgments. Mr Chng deposed that the petitioners were the sub-contractors in several projects where the company was the main contractor. Three suits have been taken out by the petitioners against the company, ie Suit No 2689/84 in respect of the People's Park Chinatown project, Suit No 10074/85 in respect of the North Bridge Road project and Suit No 10075/85 in respect of the Telok Blangah project. In Suit No 2689/84 the claim of the petitioners is for a sum exceeding $5m. In Suit No 10074/85 and Suit No 10075/85 the claims are for $269,972.49 and $501,428.75 respectively. The petitioners applied for summary judgment in respect of all three actions. Leave to defend has been granted to the company in Suit No 2689/84. In respect of the other two actions, as mentioned above, the company admitted that a sum of $149,972.49 is due to the petitioners in Suit No 10074/85 and $394,393.94 in Suit No 10075/85. Accordingly, judgment was entered for the petitioners in those sums

and the company was granted unconditional leave to defend the rest of the petitioners' claims in those two actions. In granting summary judgement on those two sums admitted by the company, the learned assistant registrar ordered that execution of the said two judgments be stayed pending the hearing of certain counterclaims by the company against the petitioners. I would add that the same counterclaims were raised by the company early in the proceedings in the three suits.

The petitioners successfully appealed to the judge-in-chambers against that part of the assistant registrar's decision that the execution of the judgments be stayed pending the hearing of the company's counterclaims against the petitioners. The company has since appealed to the Court of Appeal against the decision of the judge-in-chambers lifting the stay of the execution of the judgments. The company says that by virtue of their bona fide counterclaims which in their totality are for an amount very much exceeding the debt owing by the company to the petitioners under the two judgments, the company is justified in not complying with the statutory demand served by the petitioners.

The arguments before me centred on two main issues. First, are the counterclaims of the company against the petitioners bona fide and based on substantial grounds? Second, even if the counterclaims are based on substantial grounds, is that a sufficient basis to dismiss the petition or to order a stay?

I will now deal with the first issue. The counterclaims of the company against the petitioners are in relation to three projects as follows:

(a) Chinatown Centrepoint	$3,769,569.40
(b) Hotel Grand Central	$ 9,336.40
(c) People's Park Katong	$1,352,323.90
Total	$5,131,319.70

In respect of the Chinatown Centrepoint project the counterclaim is based on material bought and supplied on credit by the company to the petitioners and on advance payments made by the company on behalf of the petitioners in relation to miscellaneous matters. The company says that these amount to $3,604,840.33. Taking into account an amount of $105,180.96 due from the company to the petitioners in respect of work done, there is a balance of $3,499,659.37. In addition the company says that in relation to the project, it had given to the petitioners advances amounting to $270,000. All that add up to a grand total of $3,769,659.37 (I should point out that there is an insignificant discrepancy of 3 cents in the company's calculation). In support of this counterclaim, various invoices have been exhibited as evidence thereof. On the evidence before me it has not been satisfactorily shown that the counterclaim of the company, in respect of the material cost and miscellaneous payments, is not bona fide. It seems to me to be based upon substantial grounds. The petitioners have not filed any affidavit in reply to the affidavit of Chng Beng Siong, though the petitioners had asked that the court files relating to the three suits be placed before me and references were made to them at the hearing of this petition.

I do not think it is necessary to touch on the counterclaim involving the Hotel Grand Central project as the amount involved is quite insignificant. As regards the counterclaim concerning the People's Park Katong project, here again the counterclaim essentially relates to the cost of material supplied to the petitioners and miscellaneous payments made on their behalf for that project which in toto amounts to $2,670,297.83. After subtracting various sums due to the petitioners in respect of work done there is a balance of $1,352,323.90 which formed the subject of the counterclaim. As in the case of the Chinatown Centrepoint project, here the company has also exhibited various invoices to show material supplied to and miscellaneous payments made on behalf of the petitioners. Again, it seems to me that the counterclaim is bona fide.

Accordingly on the first issue which I had to decide, I held that the counterclaims in respect of the Chinatown Centrepoint and the People's Park Katong projects are bona fide and based on substantial grounds and either of the two counterclaims exceeds the amount of debt owing by the company to the petitioners under the two judgments.

I now turn to the second issue. It is undisputed that the two judgments are in respect of two projects which are distinct from the two projects in respect of which the two main counterclaims arose. The petitioners argued that as the counterclaims have nothing to do with the two judgment debts, the existence of the counterclaims should not preclude the petitioners from winding up the company on the ground that it has neglected to pay to the petitioners in response to the statutory notice of demand.

It is trite law that a winding-up petition should not be used as a means to enforce payment of a debt which is bona fide disputed. Of course that is not the point here.

Under s 254(2)(e) of the Act a company shall only be deemed to be unable to pay its debts pursuant to a statutory notice if 'the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor'. The important word in this section is the word 'neglected'. Mere omission to pay a debt on demand does not of itself constitute neglect to do so within the meaning of that provision. The word 'neglect' necessar-

ily implies some element of fault. In *Re London & Paris Banking Corp*,[1] Jessel MR said (at p 446):

> ... the word 'neglected' is not necessarily equivalent to the word 'omitted'. Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence.

The authorities do not appear to draw a distinction between a counterclaim that arises out of the same transaction or contract as the debt owing and a counterclaim which does not. It seems to me that the important thing is that the counterclaim must be bona fide and based on substantial grounds. The court should exercise its discretion in the light of all the circumstances of the case.

In *Re LHF Wools*,[2] a company had dishonoured a bill of exchange payable to a Belgian bank. The company had a cross-claim (exceeding the sum of the bill of exchange) against the bank on grounds which constituted a good cause of action in Belgium but not in England. The bank sued the company on the bill of exchange in the Queen's Bench Division and the company counterclaimed. At the trial the company abandoned the counterclaim on the ground that it would be cheaper and easier to pursue the claim against the bank in Belgium. Having obtained a judgment, the bank presented a winding-up petition. In the meantime the company instituted proceedings in Belgium against the bank though these could not be brought to trial until other proceedings there had been concluded. The Court of Appeal held that notwithstanding the judgment, the existence of a cross-claim exceeding the judgment debt made this matter one for the judge's discretion. The Court of Appeal reviewed the grounds on which the judge exercised his discretion in making the winding-up order and held that there were sufficient grounds for interfering with his exercise of discretion. It set aside the winding-up order and effectively granted a stay of the winding-up proceedings.

An earlier instructive case is *Re Portman Provincial Cinemas Ltd.*[3] There the secured creditors petitioned for the winding-up of a company, claiming to be creditors for upwards of £10,000 due under a legal charge of June 1961. The company's defence was based on a cross-claim exceeding the balance of the moneys due under the charge. That claim arose on an alleged oral agreement made in 1955, at the time of the sale of certain cinemas to the company for £175,000 by the petitioning creditors' then managing director, who died in 1962, that the creditors would indemnify the company against any losses which the latter might sustain in the future operations of the cinemas. The company sued the petitioning creditors for damages for breach of the alleged contract of indemnity. The High Court dismissed the petition and the Court of Appeal, by majority, upheld the decision. Denning MR dissented not on the ground of principle but on the ground that he doubted the genuineness of the cross-claim. He felt that the alleged oral agreement was far too vague and uncertain.

In *Re Glenbawn Park Pty Ltd*,[4] the company owed another company, Wright Heaton Rural Pty Ltd, a sum of $86,378. The company was insolvent. However, it had an unliquidated claim for damages against Wright Heaton which was the subject of a separate action taken by the company. Yeldham J said (at p 291):

> In *Re KL Tractors Ltd* [1954] VLR 505, O'Bryan J on the hearing of winding-up petition, expressly reserved the question whether the existence of a counterclaim for unliquidated damages based upon reasonable grounds constitute the petitioning creditor's debt one which was bona fide disputed. In my mind that question should be answered by saying that if a counterclaim, whether for liquidated or unliquidated damages, and whether or not arising out of the same transaction, is based upon substantial grounds, it may be relied upon to support argument that the company's alleged debt is disputed. Clearly, the ultimate creditor is that party which recovers the largest sum upon his claim and he is a creditor only for the difference between the two verdicts of judgments.

In *Re Glenbawn Park*[4] as Wright Heaton had yet to obtain a judgment against the company, the judge held that Wright Heaton was not at that stage a creditor (this point was doubted by McLelland J in *Re Jeff Reid Pty Ltd*[5]). In any event, he expressly stated that whether this determination was right or wrong, he would nevertheless exercise the discretion in favour of the company.

Then there is *Universal Chemicals Ltd* v *Hayter*,[6] where the plaintiff company owed the defendant $12,192.24. The defendant's solicitors served a statutory notice demanding payment. The debt was not disputed but the plaintiff claimed it had the right to set off this sum against a counterclaim for a greater amount. The defendant refused to give an undertaking not to issue a winding-up petition and the plaintiff sought an interim injunction to restrain the threatened issue of a winding-up petition. Barker J refused to adopt the narrow views expressed in *Re Douglas Griggs Engineering Ltd*[7] (this case will be dealt with later) and preferred the broader approach of Yeldham J in In *Re Glenbawn Park*[4].

In *Re Jeff Reid Pty Ltd*,[5] the debt relied on by the petitioner was alleged to arise under a lease agreement dated 4 August 1975 for a duration of 36 months whereby the petitioner leased to the company a piece of heavy earthmoving equipment. In April 1978, the company prematurely redelivered the equipment to the petitioner. The petitioner claimed the sum of $49,099.96 under the agreement. One of the points raised by the company was that the petitioner was liable to the com-

pany for damages for inducement of breach of contract and conspiracy in relation to two other lease agreements dated 14 January 1975 and 19 March 1975 between the company and one International Harvester Credit Corporation of Australia Ltd. The court was of the opinion that this counterclaim was 'based on substantial grounds to the extent of a substantial but presently uncertain amount'. McLelland J then went on to hold that 'the existence of a counterclaim based on substantial grounds for an amount equal to or exceeding that debt will generally provide reasonable cause for omitting to pay the debt in accordance with a demand and thus prevent the statutory presumption arising, regardless of any question of set-off'. In view of the counterclaim the court held that the petitioner had failed to show that there was a neglect to pay by the company.

In a later case *L & D Audio Acoustics Pty Ltd* v *Pioneer Electronic Australia Pty Ltd*,[8] McLelland J again said at p 184: '... the existence of a counterclaim based on substantial grounds for an amount equal to or exceeding the debt the subject of a demand will generally provide reasonable cause for omitting to pay the debt in accordance with the demand.' This view was followed by Cohen J in *Buying Systems (Aust) Pty Ltd* v *Tien Mah Litho Printing Co (Pte) Ltd*[9] where he said that a bona fide and substantial cross-claim might be a reason not to pay a demand. In *Buying Systems*,[9] an injunction was refused because the company's counterclaim was far less than the amount claimed in the statutory demand.

However, reliance was placed by the petitioners on *Re Douglas Griggs Engineering Ltd*[7] where Pennycuick J said (at p 23):

> In the event the petitioning creditor has obtained judgment and possesses all the remedies of a judgment creditor, in particular, the petitioning creditor is entitled to present a petition for winding up the company based on that judgment, and prima facie is entitled to a winding-up order against the company based on that judgment. It seems to me that this prima facie right of the petitioning creditor to a winding-up order is not displaced merely by showing that the company has a disputed claim against the petitioning creditor which is the subject of litigation in other proceedings.

But in the light of the decision of the Court of Appeal in *Re LHF Wools*[2] these views of Pennycuick J might be considered to be somewhat narrow. Even there I would say that Pennycuick J was not laying down any inflexible rule. He said a judgment creditor was 'prima facie' entitled to a winding-up order, and this prima facie right was not displaced *merely* by showing that the company had a disputed claim against the petitioning creditor. In any event, *Re Douglas Griggs*[7] was not a case concerning a company being deemed insolvent on the ground that it neglected to pay up pursuant to the statutory notice of demand but on the ground that execution or other process issued on a judgment in favour of a creditor of the company was returned unsatisfied in whole or in part.

Reverting to the facts of the present case, I think it would be wrong to treat each project in isolation. The company and the petitioners had established a special kind of relationship over many years involving several projects. Their arrangements had some unusual features. To wind up the company based on two accounts between the parties instead of all the accounts might not be entirely just, as the company might very well be at the end of the day a net creditor. I would add that there does not appear to be any creditor interested in this winding-up as no one filed any notice to support or oppose the petition. It is not without significance that in the summonses-for-directions in all the three suits (ie No 2689/84, No 10074/85 and No 10075/85), the petitioners have applied to have the three actions consolidated. I therefor held that, in all the circumstances, the company has not 'neglected' to satisfy the statutory notice and that it would be just to stay the proceedings.

The argument was made on behalf of the petitioners that as the High Court has refused a stay of execution on the two judgments then this court must accordingly grant an order on the petition. I do not think it necessarily follows. The principles applicable to a stay of execution application and to a petition to wind up are different. The presentation of a petition to wind up a company is not strictly in the nature of an execution. In *Re A Company*[10] at p 528 Phillimore LJ said:

> In some general loose sense an unsatisfied creditor may be said to be enforcing his judgment by presenting a petition for a winding-up. But, except that his judgment is evidence of his debt, a judgment creditor is in no better position for a winding-up than any other creditor.

Later Phillimore LJ said that:

> She (the petitioner) is not therefore seeking to enforce her judgment. She is proceeding to a new alternative mode of recovering her debt, a mode by which she no longer seeks to recover for herself alone but for the benefit of all the creditors ...

In the recent case *Re International Tin Council*,[11] the Court of Appeal affirmed the views expressed by Phillimore LJ.

Finally there is one matter that I ought to refer to. At the resumed hearing on 31 July 1990, counsel for the petitioners drew my attention to an affidavit which one of the petitioners has filed on 24 July 1990. In this affidavit the petitioners deposed that the company is no longer trading and from the accounts which the company has filed with the Registry of Companies for the year ending 1988, the petitioners say that the company is insolvent and that its liabilities exceed its assets. Up to the end of 1988, there was an accumulated loss of $3,457,393. Exhibited to that affidavit are a consoli-

dated balance sheet and a consolidated profit and loss account for the company ending 31 December 1988.

Ms Kong for the company submitted that it was not fair for the petitioners to put in an affidavit of this nature at this very late stage of the hearing. In any event, she argued that the petition to wind up the company was based entirely on the fact that the company neglected to pay the debt demanded in the statutory notice. No other facts have been set out in the petition to wind up the company on the ground that it is generally insolvent, which the new affidavit now seeks to do.

Halsbury's Laws of England (4th Ed) 7(2) para 1058 states the following:

> *In his petition a petitioner must allege* and prove *the facts entitling him to present it*, showing that one or more of the grounds specified in the Involvency Act 1986 or in any other enactment for making a compulsory order exist. Unless these allegations are contained in the petition, it is misconceived, and the court will dismiss it. The court will not travel outside the allegations in the petition. (Emphasis added.)

Other than a bare statement in para 8 of the petition which reads 'alternatively the company is insolvent and unable to pay its debts' there is no other statement or allegation in the petition setting out facts to show that the company is generally insolvent. The affidavit filed by the petitioners at the eleventh hour was an attempt to introduce evidence on the company's general insolvency even though nothing on that is stated in the petition itself. I agreed with the submission of the counsel for the company that it would be grossly unfairly to permit the introduction of such facts by affidavit at that late stage. The company had hardly an adequate opportunity to rebut.

I think the following comments by Megarry J in *Re Fildes Bros Ltd*[12] at p 923 are most apt:

> In cases in which there are no normal pleadings, it seems to me important that those who oppose a winding-up should know, in time to prepare their case, what are the allegations that they have to meet. If after a petition has been presented the petitioner wishes to broaden his attack, let him first amend his petition.

Accordingly, I ruled that for the purposes of the hearing I would disregard that affidavit which was filed to persuade the court to wind up the company on the ground that it is generally insolvent.

Petition stayed.

Solicitors: *Chia Tan & Yek; Shook Lin & Bok.*

Reported by *Jeff Leong Pak Lim*

MALAYSIAN REPORTS

Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-36 OF 1990
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND HARUN HASHIM SCJJ
27 DECEMBER 1990

Land Law — Recovery of possession of state land — Summary procedure — Not applicable where land held under licence — Rules of the High Court 1980, O 89

Civil Procedure — Summary procedure for recovery of the possession of state land — When applicable — Rules of the High Court 1980, O 89

In this case the forefathers of the appellants and other unnamed occupiers were pioneer settlers of the agricultural land in dispute. The appellants alleged that between 1971 and 1976 they and the others made application to the state authority for titles of the said land. There was evidence by affidavit and documentary exhibits to show that the Selangor State Executive Council had approved the alienation of the said land to the appellants and other selected settlers and on 1 November 1980, a member of the State Executive Council confirmed the approval and assured them that they would be given titles to the said land. Following the policy of the state government that only genuine and landless farmers would be given the land, only temporary occupation licences ('TOL') were granted to the farmers, on the understanding that separate titles to the land would be issued provided they continued to cultivate the land and remained with landless status. The appellants contended that after the expiry of the TOL period in 1984, since they and the other farmers had satisfied the conditions imposed by the respondent they have acquired legal right or expectation to be issued with land titles. The respondent however thought fit to hand over the lands to the Federal Land Consolidation and Rehabilitation Authority (FELCRA). The respondent on behalf of the state government applied summarily under O 89 of the Rules of the High Court 1980 for possession of the land without even offering any compensation relating to the eviction of the appellants and others from the land. The question at issue was the propriety of the application of the said O 89 to the facts and circumstances of this case. The learned judge of the High Court allowed the application of the respondent and the appellants appealed.

Held, allowing the appeal:

(1) The appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, if not all, of the other farmers have occupied the said land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the alienation already approved prior to the TOLs.

(2) There are issues to be tried in this case which are not suitable to be decided by affidavit evidence. This case should not therefore have been dealt with summarily under O 89 of the Rules of the High Court 1980.

(3) For the purpose of the summary procedure under O 89 a distinction should be made between squatters simpliciter who have no rights whatsoever and occupiers with licence or consent, as well as tenants and licensees holding over.